

**GROWTH MANAGEMENT**

**LECTURE #1**

**MUNICIPAL LAW LECTURE SERIES  
FALL, 2002(REVISED 8-19-04)**

**BY: Stephen C. Buckley, Esq  
Bossie, Kelly, Hodes, Buckley  
& McGrath, P.A.  
440 Hanover Street  
Manchester, NH 03104  
(603) 668-2222  
E-Mail: sbuckley@bkhbpa.com**

**GROWTH MANAGEMENT**  
**BY: STEPHEN C. BUCKLEY**

**1. INTRODUCTION:**

Growth Management under NH RSA 674:22 and RSA 674:23 permits NH municipalities to control the rate of land use development. Any municipality undertaking growth management must accept that growth management ordinances are considered inherently suspect and are prone to challenge by affected individuals and developers. As the Court of Appeals of New York said in the leading growth management case entitled Golden v. Planning Board of the Town of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291 (1972):

There is, then, something inherently suspect in a scheme that, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands. Although zoning must include schemes designed to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have been wont to try their hand at an array of exclusionary devices in the hope of avoiding the burden which growth must inevitably bring. Ramapo, 285 N.E. 2d at page 300.

Growth management under RSA 674:22 and RSA 674:23 can numerically control the number of new building permits, or limit other land use permits and approvals in order to control the demand for municipal services.

**A. Circumstances Leading to the Call for Growth Management:**

At one time or another most towns and cities in New Hampshire, especially near the seacoast and southern New Hampshire, have experienced periods of rapid growth that have placed strains on municipal services and infrastructure. Existing residents suddenly feel overwhelmed by the number of new residents, and usually that impact is most evident in school

overcrowding. However, school overcrowding is not the only place where the resource demands of new residents can be felt as this can also occur in overcrowded recreational facilities, increased demands on police and fire services, and road and traffic bottlenecks that did not previously exist. It will be these increased demands on municipal services that may generate a call for some control on the pace of development. It is at that juncture a decision is made to undertake consideration of growth management. Because not every municipality has the planning studies necessary to undertake the adoption of growth management under RSA 674:22, it is prudent to first consider the adoption of interim growth management regulation under RSA 674:23.

## **B. Comparison of RSA 674:22 and RSA 674:23:**

The grant of power to cities and towns to adopt zoning under RSA 674:16 specifically includes the authority to regulate and to control the timing of development as provided in RSA 674:22. See, RSA 674:16 (III). However, RSA 674:22, Growth Management: Timing of Development, contains the requirement that a growth management ordinance can only be adopted “... ***after preparation and adoption by the Planning Board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.***” See, RSA 674:22. Even if your city or town has an existing master plan and a capital improvement plan, those documents will need to be revised and updated to reflect current development circumstances in your region of the state. For those cities or towns that do not have a master plan and a capital improvement plan, these documents must be developed and adopted by the Planning Board prior to the implementation of growth management. For this reason, the legislature has provided a mechanism to allow towns to adopt interim growth regulations, which can be in existence for one year.

## **2. INTERIM GROWTH MANAGEMENT – RSA 674:23:**

Anticipating that cities and towns may not have the necessary planning documents in place to adopt growth management under RSA 674:22, an interim regulation can be adopted to control growth for one year. The New Hampshire Supreme Court has long recognized the need for interim growth regulations as a prelude to the adoption a growth management ordinance. In Beck v. Raymond, 118 NH 793 (1978), the Supreme Court overturned the Raymond Slow Growth Regulation in part by allowing Raymond to continue to regulate growth as a temporary emergency measure, and this afforded Raymond two years to develop a comprehensive plan for phasing growth. As

an outgrowth growth of the Beck decision the legislature adopted RSA 31:62-b, the statutory precursor of RSA 674:23

**A. What Form Can Interim Growth Regulations Take?:**

In Conway v. Town of Stratham, 120 NH 257 (1980), the NH Supreme Court ruled that the Town of Stratham slow-growth ordinance, which restricted the number of lots in a subdivision the Planning Board could approve, was a permissible form of interim growth regulation. This case makes clear that an interim growth regulation, can not only limit building permits, but can also control the number of subdivided lots that can be approved by the Planning Board.

**B. Preliminary Findings for Interim Growth Ordinance:**

In order to adopt an Interim Growth Regulation under, RSA 674:23, the Planning board must first make findings of fact indicating that there are unusual circumstances requiring prompt adoption of interim growth regulations. I would recommend that even before drafting a proposed interim growth regulation, the Planning Board first hold a public hearing in order to decide whether or not there are such unusual circumstances. At that public hearing the Planning Board should receive some kind of presentation from the local school district and municipal government providing facts about overcrowding in schools or other strain on municipal services, which makes clear that there is a deficiency in the ability of the municipal infrastructure to supply services to existing residents. After those presentations, the Board should adopt a motion making findings that the town is enduring a level of rapid development that is straining municipal and school services beyond their capacity such that there is a need to promptly adopt interim growth regulations.

**C. Content of Interim Growth Regulation:**

Once the Planning Board has made the required finding of unusual circumstances then, and only then, should the interim regulations be drafted. The Interim Growth regulation should specifically exempts lots of record shown by deed or recorded subdivision plans. This is necessary protection for those who have a vested interest in obtaining a building permit, either under common law vesting or RSA 674:39, the subdivision vesting statute.

**D. Adoption Procedures for Interim Growth Regulation:**

RSA 674:23 (II) (a) requires the Planning Board has to hold one public hearing on the interim growth regulation, with notice as provided by RSA 675:7. The notice, which is posted and published in a newspaper, should

either contain the full text of the proposed ordinance or an adequate description. Because of the substantial similarity between RSA 674:23 (II) (a) and the notice and hearing requirements under RSA Chapter 675, it is my opinion that a hearing on an interim growth regulation could be combined together with other zoning amendment hearings that would be acted upon at an annual town meeting. ***Under all circumstances the local legislative body is required to take final action on the proposed interim growth regulation not later than ninety (90) days from date of posting for the public hearing before the Planning Board.***

**E. Defacto Effect of Interim Growth Regulation:**

Under RSA 676:12, the interim growth regulation will go into defacto effect upon posting if the date of posting is within 120 days of the Town Meeting. That is, the Building Inspector has to assume the interim growth regulation is in effect and enforce the ordinance as if it had been adopted by the Town Meeting until final action by the Town Meeting. It is suggested that your interim regulation specifically state the posting date.

**F. Interim Growth Regulation Expiration:**

Interim growth management regulations expire within one year from the date of adoption by the town meeting. Within that period of time the Planning Board must move forward with the adoption of the necessary other planning documents (e.g., Master Plan Update, CIP, etc.) if an RSA 674:22 Growth Management Ordinance is to be proposed.

**3. ADOPTION OF GROWTH MANAGEMENT PURSUANT TO RSA 674:22:**

Whether employing interim growth regulations or not, the adoption of growth management must be preceded by a deliberate process of adopting or updating the town's master plan and capital improvements plan. Justification for adoption of growth management is guided by principles establish by the New Hampshire Supreme Court on the validity of growth management. Any growth management ordinance must also not impair the municipal obligation to provide affordable housing for low and moderate-income families. Britton v. Town of Chester, 134 NH 434 (1991).

**A. Case Law and Statutory Principles for the Evaluation of Growth Management:**

As stated in Beck v. Raymond, 118 NH 793 (1978) and as further explained in Stoney-Brook Development Corporation v. Town of Freemont, 124 NH 583

(1984) and Rancourt v. Town of Barnstead, 129 NH 45 (1986), the following general guidelines should be taken into careful consideration in the process of developing the planning documents and ordinance to implement growth management:

1. Growth controls must be reasonable and non-discriminatory.
2. Growth regulations should be the product of careful and solid and scientific planning.
3. Growth controls must properly balance regional and local needs.
4. Growth controls must be constantly reexamined with a goal toward eventually relaxing or eliminating the controls.
5. The adopting municipality must demonstrate good faith efforts to increase the capacity of municipal services that accompany normal growth.
6. Growth regulations cannot be parochial, that is the growth regulations must not be imposed simply to exclude outsiders.
7. Growth management must be part of a reasonable overall program aimed at managing growth in a responsible manner.
8. The adopted growth regulations cannot impair the town's ability to meet its obligations to provide a fair share of low and moderate income housing in the region.

**B. Factors to be Considered to Determine What is a “Normal” Rate of Growth:**

In Rancourt v. Barnstead, 129 NH 45 (1986) the NH Supreme Court said that a growth control ordinance is valid only if it restricts projected normal growth no more than is necessary to allow for an orderly and good faith development of municipal services. A normal rate of growth is determined by looking at the following factors:

1. What are effects of existing zoning or other land use restrictions on growth?
2. What constitutes a reasonable rate of increase of municipal services for a particular town?
3. What is the cost of extending municipal services?
4. What is the capacity of the town's existing citizenry to adjust to the higher tax burden necessarily associated with an extension of municipal services?
5. What is the probable use of proposed dwellings (e.g. recreational use as distinguished from primarily homes)?
6. What is the availability and suitability of undeveloped land in neighboring towns and the overall growth of the region in which the town is located?

**C. Engage the Assistance of a Planning Professional:**

First and foremost in the adoption of growth management ordinance is the engagement of a planning professional, whether from the regional planning agencies or a private planning consultant, to assist the town in developing the solid, scientific and statistical foundation for the adoption of growth management. In towns that have a master plan, it is highly advisable that at a minimum the housing section of that master plan be updated to reflect current demand for housing within the region. HB 650, Chapter 178 of 2002 Legislative Session, amending NH RSA 674:2 states that the Master Plan may contain a housing section as follows:

(l) A housing section which assesses local housing conditions and projects future housing needs of residents of all levels of income and ages in the municipality and the region as identified in the regional housing needs assessment performed by the regional planning commission pursuant to RSA 36:47, II, and which integrates the availability of human services with other planning undertaken by the community.

Chapter 178 also contains a new provision for regional concerns:

(i) A regional concern section, which describes the specific areas in the municipality of significant regional interest. These areas may include resources wholly contained within the municipality or bordering, or shared, or both, with neighboring municipalities. Items to be considered may include but are not limited to public facilities, natural resources, economic and housing potential, transportation, agriculture, and open space. The intent of this section is to promote regional awareness in managing growth while fulfilling the vision statements.

RSA 36:47 (II) states that each regional planning commission is to compile a regional housing needs assessment which shall include an assessment of the regional need for housing for persons of all levels of income. This regional housing assessment must be updated every five (5) years and made available to all municipalities in the planning region. ***Certainly, the planning consultant engaged by the Town has to consider this regional housing needs assessment as prepared by the regional planning commission.***

**D. Definition of the Region for Growth Management Purposes:**

The Supreme Court suggested in Stoney-Brook Development Corporation v. Town of Freemont, 124 NH 583 (1984), that the measure of a town's duty to

accept growth is by comparison to the average growth in the abutting towns. If your town growth rate is greater than the average growth rate for the towns in your region, which is defined by the towns directly abutting your town, the adoption of growth management may be justified.

**E. Statistical Evidence of Growth:**

The planner engaged by the town to should be careful when using common employed statistical information on building permits. There is compilation of building permits issued employed by planning commissions that is published by the Bureau of the Census, Manufacturing and Construction Division, Building Permits Branch. This report of building permits is not always accurate or current. It will be worth the town's time and energy to directly contact each building department of each abutting town to verify the actual number of residential building permits issued.

**F. Impact of Growth Management on Providing Affordable Housing:**

Under Britton v. Town of Chester, 134 NH 434 (1991), and the affordable housing assessment performed by the regional planning commission, your town has a certain fair share of affordable housing. Under RSA 204-C:56 affordable housing is defined as follows:

Housing whose combined rental and utility costs or combined mortgage loan debt services, property taxes and required insurance do not exceed thirty percent (30%) of the gross income a persons of low or moderate income, as the case may be.

In this same statute, a person of low income is defined as follows:

“Person of low income” means any single individual or any family whose gross income is less than fifty percent (50%) of the immediate income of respectively, all single persons or all families, adjusted for the number of member, residing in the applicable geographical area of the state.

In the same statute, person of moderate income is defined as follows:

“Person of moderate income” means any single individual or any family whose gross income is between 50 and 80 percent of the median of, respectively, all single persons or all families,



adjusted for the number of members, residing in the applicable geographical area of the state.

In drafting any proposed growth management ordinance for your town, it is recommended that you first determine whether your town is meeting the regional assessment of the housing needs for low and moderate-income people. This can be obtained from your regional planning commission. If your town is already deficient in providing low and moderate-income housing, then it is advisable that any growth management ordinance specifically exempt housing for low and moderate-income persons as defined above.

**G. Housing for the Elderly and Growth Management:**

Another reasonable step to take in adopting growth management is to exempt housing for the elderly from growth management. First, I think most planners would agree that there is a significant demand for housing for the elderly. Exempting housing for the elderly from growth management would potentially limit the number of people who would challenge the ordinance. Second, I believe a town can substantially limit the effect of growth on the town even with housing for the elderly exempt from growth management because the greatest municipal budget line-item, schools, should not be significantly affected by housing for the elderly. Housing for the elderly should be defined by reference to NH RSA 354-A:15, Housing for Older Persons.

**H. Adopt Master Plan, CIP or Housing Element Update Before Consideration of Adoption of Growth Management:**

The planner engaged by the Planning Board should have prepared for the Planning Board's approval, either a Master Plan or Master plan update addressing housing needs, and CIP and/or CIP update. Only after these documents are adopted by the Planning Board should the Planning Board decide whether to move forward with the adoption a Growth Management Ordinance under RSA 674:22. Master Plans and Master Plan amendments must be adopted by the Planning Board after a public hearing with notice required under RSA 675:7. At the public hearing, the Planning Board should have its planner present the findings of the housing update and/or master plan, especially with regards to whether or not there is a reason for the town to consider the adoption of a growth management ordinance. It is at that time the board should have a dialogue amongst itself, the public and the planner to decide whether growth management should be adopted. Then, and only then, should the Board decide – is growth management justified and necessary? It is very important that after the master plan and/or master plan update is adopted by the Planning Board, that the adopted document be

filed with the Town Clerk. This is provided in RSA 675:6 (III). The master plan or master plan update will have no legal force and effect until it is certified as adopted by the Planning Board and filed with the town clerk. Rallis v. Town of Hampton Planning Board 146 NH 18 (2001).

## **I. Drafting of Growth Management Ordinance:**

Having reached the stage where the planning evidence justifies the adoption of growth management, then comes the time to draft the growth management ordinance. There is a wide variety of methods of controlling growth. Some limit the number of building permits for residential dwelling units, others control subdivision of land. I would suggest that in consultation with the planner you have employed to prepare the necessary planning documents, that you further employ that planner to draft a proposed ordinance. In the alternative, there are a number of excellent growth management ordinances which are available at the New Hampshire Office Energy and Planning website, at <http://www.nh.gov/oep/resourcelibrary/>. I would recommend that any such ordinance contain an introductory portion that includes a general statement of the principles and planning evidence that justifies the adoption of the ordinance. In addition, the following items should be considered:

1. **Vesting:** The ordinance should make clear what lots are affected by the regulation. There will certainly be a number of lots within the municipality that will be exempt because of subdivision vesting under RSA 674:39. It may be far simpler to state that all existing lots of record whether in an approved subdivision plan or recorded deed, are exempt from the growth management ordinance.
2. **Expiration:** The ordinance must contain a provision that states when growth management is no longer necessary and/or when growth management ordinance will sunset.
3. **Permit Distribution Formulas:** It is never easy to develop a fair mechanism for distributing what is going to become a scarce resource, building permits for new residential dwelling units. There is a need to balance the needs of those who have just a one single-family home lot against developers who have larger needs for project development. It is recommended that advice be obtained from the planning consultant with further review of the growth management ordinances posted in the Office of State Planning website referenced above.
4. **Carryover Provisions:** The ordinance should permit the carryover of permits from one year to another. This will allow

developers to benefit from years where growth pressures do not reach the planned rate of growth.

**J. Legal Challenges to an Adopted Growth Management Ordinance:**

The challenge to the validity of a growth management ordinance will either come as a “facial” challenge to the ordinance itself, or a challenge to the ordinance “as applied”. A facial contest means the person challenging the ordinance is questioning the underlying scientific and planning basis for the ordinance and whether or not the ordinance properly balances regional and local housing needs. This type of legal challenge is usually addressed to the conclusions made by the Master Plan or Master Plan Update, and whether those documents have a sound and the solid scientific basis. In an as applied contest the plaintiff attempts to demonstrate that the growth ordinance as applied to plaintiff’s project is inordinately unfair and constitutes unreasonable regulation and questions whether the ordinance is fundamentally fair both in general and in relation to the particular property of the applicant under consideration. E. Milton Dow v. Town of Effingham, 147 NH \_\_\_\_ (Decided July 25, 2002). See also, Quirk v. Town of New Boston, 140 NH 124 (1995).

A recent challenge to Hudson’s growth management ordinance used the “as applied” approach. Kay’s Realty, Inc. v. Town of Hudson, Hillsborough County Superior Docket No. 01-E-0434. The plaintiff was challenging the application of growth management to a 90-unit multi-family housing project. Plaintiff’s expert testified that this large project was being penalized to the benefit of smaller projects that were being encouraged. The Superior Court evaluated the number of permits that could be issued per year to the project and concluded that it would take eight years to complete the 90-unit development. The Court went on to find that Hudson’s growth management ordinance unreasonable as applied to that project. That decision is under appeal to the Supreme Court. This decision does point out that an effective as applied argument can be employed to undermine the applicability of a growth management ordinance. This challenge was to the formula used by Hudson to distribute permits fairly to both small and large projects. Although under appeal, it does point out the need to be very for careful when considering the formula for distributing permits.

**K. Impact Fees and Growth Management:**

In Monahan-Fortin, LLC v. Town of Hudson, 148 NH 769 (2002) the NH Supreme Court agreed with the Town of Hudson that impact fees can be imposed on a project that is also subject to growth management. In that case

the Court was called upon to interpret RSA 674:21(V)(h), which reads as follows:

The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development.

In construing this language the Court said that this only prohibits a town from applying a *subsequently* adopted growth management ordinance to a project that has already *paid* or had been *assessed* impact fees. This language prevents a town from adopting a new growth management ordinance and applying it to a project that has already been assessed or has paid impact fees.

#### 4. CONCLUSION:

Growth management generates a host of complicated planning and legal issues and should not be lightly undertaken. Interim growth regulations can be adopted for one year to allow time for preparation of a master plan and capital improvement plan. Thereafter, a growth management ordinance should be only be proposed and adopted ***after*** a very deliberate master planning process that employs current planning statistics to determine whether growth management is justified. Essential to that process is the employment of a planning professional to assist and advise the Planning Board.